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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/783,152	02/20/2004	Rafail Zubok	532/7X2	7040
51640	7590	05/07/2007		
SPINE MP LERNER, DAVID, et al. 600 SOUTH AVENUE WEST WESTFIELD, NJ 07090			EXAMINER PELLEGRINO, BRIAN E	
			ART UNIT 3738	PAPER NUMBER
			MAIL DATE 05/07/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/783,152

Applicant(s)

ZUBOK ET AL.

Examiner

Brian E. Pellegrino

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 12 February 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3-12,16 and 17 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3-12,16 and 17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 3-6 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In claim 3, the recitation that "a base oriented substantially perpendicular to the base" makes no sense and is ambiguous.

Claim 5 recites the limitation "the U-shaped member" in line 2 of the claim. There is insufficient antecedent basis for this limitation in the claim.

### ***Claim Rejections - 35 USC § 102***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1,3-5,8-10,16 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Aebi et al. (6261296). Fig. 14 shows an instrument **200** having an actuation handle **212** with fork-shaped extensions **214** extending from the distal end. It can also be seen there are base portions for the extensions or elongate sections that can be arbitrarily said to extend from the hinge portion of the handle. The base portions can be construed to be U-shaped, form a vertebral stop and have a curved profile. Fig. 5 shows an intervertebral disc to be inserted with upper and lower baseplates that can

be positioned between the fork-shaped extensions. One set of tines is longitudinally aligned with the elongate section.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 6,7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Aebi et al. '296 in view of Neumann (EP 1219266). Aebi et al. is explained supra. However, Aebi et al. fail to disclose the stop having a ridge oriented perpendicular to the tines' outward surfaces or a notch in the interior surface of the extensions. Neumann teaches (Fig. 11) a fork-shaped extension having a base **26** and a pair of laterally spaced tines perpendicular to the base and slight notches in the interior between the upper and lower tines. It would have been obvious to one of ordinary skill in the art to incorporate a ridge and notch in the extension fork-shaped distraction end as taught by Neumann with the instrument of Aebi et al. such that it provides more stabilization for the instrument to hold the implant and less likely to slip from the instrument.

Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Aebi et al. '296 in view of Keller (DE 3023942). Aebi et al. is explained supra. However, Aebi et al. fail to disclose the plying device comprises at least two hinges. Keller teaches (Fig. 6) a plying device having at least two hinges in the intermediate portion and an actuation handle. It would have been obvious to one of ordinary skill in the art to

incorporate multiple hinges as taught by Keller with the instrument of Aebi et al. such that it provides a greater length to deliver the spinal device in the patient.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Aebi et al. '296 in view of Michelson (6080155). Aebi et al. is explained supra. However, Aebi et al. does not disclose the extensions are detachable. Michelson shows (Fig. 2) detachable prongs from the instrumentation. Michelson also teaches (col. 21, lines 2-4, 15-19) that the detachable extensions enable the surgeon to stabilize the implant and perform any other procedures at the implantation site by not having an elongate instrument extending from the patient. It would have been obvious to one of ordinary skill in the art to utilize a detachable forked extension as taught by Michelson and modify the instrumentation of Aebi et al. such that the tool enables the surgeon to separate the handle from the extensions and thus prevents any inadvertent movement of the implant and allows the surgeon to perform any other necessary surgical measures.

Claim 17 is rejected under 35 U.S.C. 103(a) as being unpatentable over Aebi et al. '296 in view of Buttner-Janz et al. (5401269). Aebi et al. is explained above. It is noted that Aebi does disclose teeth on the implant, see Figs. 4,5. However, Aebi fails to disclose teeth spaced apart from a centrally disposed dome. Buttner-Janz teaches (Figs. 3,4) a centrally disposed dome between the plates and teeth spaced apart towards the perimeter of the plates and on the exterior surface such that they are apart from the dome. It would have been obvious to one of ordinary skill in the art to incorporate the teeth as placed on the exterior surface of the plates taught by Buttner-

Janz in substitution of the teeth of Aebi et al. implant and incorporate an articulating dome centrally within the plates as taught by Buttner-Janz for the device of Aebi such that it allows the device to permit articulation in a patient not requiring fusion.

### ***Response to Arguments***

Applicant's arguments with respect to claims 1 and 16 have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Auerbach et al. (6302842) show an instrument with an actuation handle and a distal extension that is offset from the axis of the handle.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

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extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian E. Pellegrino whose telephone number is 571-272-4756. The examiner can normally be reached on M-Fr (9am-5:30pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

TC 3700, AU 3738

**BRIAN E. PELLEGRINO**  
**PRIMARY EXAMINER**

